

THE MORTGAGE CONTRACT DOMINANCE IN PARTICIPATION CONTRACTS OF ISLAMIC BANKING

Farhad Khademi¹ and Javad Vahedizadeh^{1*}

¹Department of Islamic law and jurisprudence, Ardabil Branch, Islamic Azad University, Ardabil, Iran

*Corresponding Author: Javad Vahedizadeh

ABSTRACT

The research seeks to explore the necessity of the relevant issues of the contracts used in Islamic banking and check the domain of religious obligation, especially the dominance of mortgage contract on Islamic banking partnership contracts including co-partnership and participation, first by clarifying the legal concepts and jurisprudence each of the contracts listed in the circle of common principles of the Islamic sects that are accepted generally, and especially Shiite jurisprudence try to express the interactions between the two main contracts of mortgage and incorporation at the time of combination to grant banking facilities that mainly strengthens the rule of the bank on customer and with a one-way analysis and being imposed of contracts of their participation, and providing conditions out of them that makes the contract unrealistic, the need to review the structure of the contracts for compliance with religious teachings is proved, and moreover, it proves the unfair forecast of certain profit at the time of concluding of contract in these contracts that is hidden relying on gotten pledge and the emergency of the customer in reliance on banking facilities from the evident gaps of these contracts that would damage the legitimacy of the economic system. At the end and conclusions, the study will prove all the defects pertaining to the unreal provisions and introduce proper alternatives for them and suggest proper patterns such as permission conducts, shares, securities, and peace and Jealeh patterns that most of the cases in other Muslim countries improve the business environment and increasing rates of inflation and recession.

KEY WORDS: mortgage contract dominance, human life, participative contracts, Islamic banking,

INTRODUCTION

Participation, co-partnership, Mozare-eh, are sharecropping of methods and sharing contracts that have been proposed in the jurisprudence literature, and have been used in the recent experience of Islamic banking as financing methods and due to their different nature with exchange contracts before the public and private banks because of the possibility of applying a variable and high profits have gotten popular. An obvious example of these contracts is the contracts of civic incorporation in which both the contracting parties or all the parties of the contract (if more than two people). Based on the essence and nature of these contracts, those who provide some part of the firm investment have the right to participate in decision process (management and business) participate. Although within the compilation of books and articles, successful simulations about adopting collaborative agreements with religious, legal and juridical teachings have been reached, and most authors consider the contracts resulting from the participation a factor for healthy economy and increase of the profits but no theory or neat compilation about the potential gaps resulting from such contracts are prepared (at least so far) and perhaps the main reason should be this that the main body of the banks belongs to the governments and refusal of facing with this issue. The present study attempts to take a small step for promotion and dynamics of Islamic economy by expressing the vacuums of such contracts and strategies for their enhancement (Mosavian, 2002).

Expressing the issue

partnership contracts are among the most common of the Islamic banking contracts and the similarity of these contracts is that the banks participate with facility receiver in a production or commercial activities, and if it is profitable, the benefit is shared with the bank and the facility receiver so those contracts will be coordinated with the provisions of

civil law and Islamic jurisprudence if: First, there is no previous agreement about the sum or a certain percentage of profit because as long as the company or productive activity is not profitable in fact there is no benefit to be shared between the parties or be agreed between the parties but in practice at all kinds of partnership agreements the profit is forecast and also in the form of mortgage contracts, late payment penalties are added to the rate of interest. Obviously, if a customer or debtor can prove that the partnership is true because at concluded contracts, the necessity of the contract provisions is on responsibility of mortgagor individually according to the nature of the contract. So the bank with confidence does not rely on all the provisions of the contract and given to the support of the judicial tribunals and record authorities, however demands and gets its obligations separated from the legal objections such as of religious exceptions. Secondly, the capital or facility owner cannot demand guarantee, because the two parties takes part in an activity or organization and request for a guarantee out of the partner is not consistent with none of the rules governing the civil or commercial corporation and the banks conclude the contract in a separate agreement to evade this category, and with respect to the fact that none of these contracts mention that these contracts are separated, imposing provisions, as well as the rejecting additional costs from increase of the materials and equipment and undertaking no damage, the banks consider the contract illegal and conclude that it is void (Article 217 of the Civil Code). In support of the above cases, the Note 1(single article), reasonability of the interest rate of the bank facilities according to return rate in different economic sectors approved on 31/02/1385 Prescribes that "about contracts with variable efficient, the take part in the results of the economic activities under the contract without determining the expected interest rate, in partnership contracts for production, the mentioned case in the debtor clause note of the Article 3 of banking interest-free law passed in 1984, cannot demand an out-plan bail from the partner " In reviewing contracts it is exactly observed that the bank mentions its favorable interest that is more than the maximum prescribed by Islamic banking in the form of "desired profit ", at contract and there is no « absolute » security" or a "plan-related security".

Second, even if it is not provided in the event of damage, the owner of the property or facility as a partner is responsible and may lose his capital and it is one of the requirements of participation contracts that are not actually evident at banking contracts.

MATERIALS AND METHODS

Research questions

1. Why does the mortgage contract despite being subordinated affect all of participation contracts in the application of Islamic banking?
2. What strategies are conceivable for the proper implementation of participation contracts in order to prevent the nominal contracts in the form of supervision?
3. How are the unrealistic and formal terms applied in participation contracts of Islamic banking?
4. How is it justified the lack of planning confluence of the parties' consent in the composition of banking participation contracts in accordance with the law?

Background of research

However, the right should not be overlooked that some of the authors such as the doctor Ali Masoudi in Banking Law book, doctor Mustafa Alsan in a work under the same title, doctor Mohammed Nijat-Ullah Siddiq in Interest book, bank interest and martyr Sayyid Muhammad Baqir al-Sadr in the Free-interest bank book together consider the loss as capital erosion of the firm that everyone proportional to his share should suffer the loss, though Feqh searches this type of company in the Anan company, but in the financial institution and company's participation contracts, these companies do not accept the loss and in addition to determining the interest rate at the fixed contract rate at the time of the contract demand several bails in order to guarantee the principal and interest for participation. Interest-Free Banking in terms of age and experience is younger in other countries, and regardless of the forty-first Article of constitution that the compliance of all financial and economic laws and with Islamic regulations is necessary the special law of it dates to 1362/6/8 and consequently the research background of law and the experience that has been passed since three decades ago is far less than other Feqh instructions that have been criticized (Valinezhad, 2013).

Most authors of banking law and Islamic law experts in the field of this study have been considered loss as the erosion of capital but on the other hand they are contrary to the interest of the opportunity cost of property (Kahe, 2008). The authors believe that an individual loan a property cannot get a profit, rather than spending time and about the

participation contracts also, making the copartner as a voucher for capital is void and it is not consistent with the logic of Islamic law and codified civil law (Mosavian, 2002). Of course, all studies submitted are mainly related to the implementation of Article 44 of the constitution of the annual budget development rules and along with the privatization of banks despite the apparent control of the central bank on interest rates of loans and deposits, banks actually evade and this is due to the lack of regulatory levers. The recent developments consider the Privatization as credibility criteria at their original factors (Valinezhad, 2013).

Hypotheses

- 1- Being unilateral of the partnership agreements of banking contracts should be corrected at first.
- 2- Supervision of the proper implementation of contracts in order to avoid formal contracts should be more integrated.
3. The use of unrealistic and unrealistic clauses in participation contracts in Islamic banking should be avoided.
4. Participation contracts with the composition intention of the parties and intention confluence of their security is not according to law.

Necessity for research

Given that the most of securities for participation contracts are concluded in the form of mortgage contract and at less sum and promissory notes or binding documents are taken and the important point and the legal problem of the issue is taking action against requirement of the two contracts of the company and mortgage even it is assumed that the actions that have been done are correct. Because it is contrary to the company's contract nature to receive bail from the partner and also given to the consequent of mortgage contract, receiving bail before the liability is a double opposition. In addition, unrealistic conditions, setting the contracts formally and with the unreal evidence and other illegal and religious oppositions are of the concerns of the present. Another approach attempts to break the gaps of the contracts that in terms of rejecting of any loss and the guarantee of principal and interest under the mortgage and security and in practice and pattern, relying on the successful experiences of other Muslim countries and accepted legal theories provide appropriate solutions. In answer to the main research questions, including the dominance of the mortgage contract on participation contracts as requested by banks solutions are offered that by them in addition to enabling the proper participation contracts, as well as preserving the interests of the banking, with use of the legal guidelines according to the intended examples, the application of the formal and unreal provisions of the contracts by the banks are prevented. Given the importance of achieving the participation contracts used by the banks were required to clarify the study unfortunately, most banks refused to provide raw samples and the author has done the necessary analyses by citing to the collected contracts by the supervisor and the advocacy offices that have such files that this issue is related to the unrealistic contracts. The purpose of the study is around the axis of the need to review the unreal and non-religious provisions of participation contracts and packages to improve them and reminds a kind of a legal and regulatory hygiene in this regard and juridical and legal solutions are offered by the study to provide better indicators of infrastructure of such contracts in expressing these shortcomings and disadvantages, with explicit quantitative obligations toward its predecessors to innovation.

RESULTS

Based on the investigations that were presented, we tried to state the most important interest-free banking challenges and participation contracts used. Within 30 years of trial and error however, as the conclusions based on the research questions we present at first the operational proposals and at the end some applied models are presented As a result of the research achievements.

First assumption

At the first axis it was assumed that participation contracts in banks are unilateral and should be corrected. in this assumption by investigation of the mortgage contract and security And bail over all participation contracts, it was said that The main problem of interest-free banking is interest centered approach (absolute return) for mobilizing and allocating resources and therefore, the dominant position of mortgage contract is lost against participation contracts (Alsan, 2012).

Real participation contract is required to solve this problem and to do so, it is essential to preserve the risk of owners and to implement the participation in the profits and losses at the side of depositors and at the side of allocation of resources. The important thing is that if participation in the profits and losses made on resource mobilization,

automatically the allocation of resources is not necessary to guarantee the principal or at least the expected profit. In other words, implementing it in the resource mobilization and consequently in allocation of resources Means the eradication of the unjust system on risk distribution and return based on interest and because such is now the usual way of banks the contracts are imposed and no subtle change is made thus, the first assumption is proved (Alsan, 2012).

The second assumption

The second assumption of research seeks to provide solutions to monitor the proper implementation of contracts to prevent them from being formal. The target of Islamic banking is that the capital of people flood from the money market to capital market and activities in the real section of economy. To expand investment we need clear information on the activities and performance of the real economy sections and firms. Why that calculation of risk and expected return is possible only with data. On the other hand, the use of this information and calculating the risk and return that is called project evaluation is a specialized job and the every one cannot do it. Monitoring the proper implementation of facilities through Islamic contracts especially the cooperation and partnership agreements are costly. Islamic system should pay the amount necessary to prevent forbidden actions including usury. Although the cost of Islamic banking supervision is more than usury banking, but the cost in comparison with the positive economic effects resulting from usury removal is minimal. To reduce monitoring costs it can be said that increasing activities of insurance companies, corporations, investment companies, etc. suggests this fact that you can overcome the costs of supervision. Although at the practical and administrative practices, cooperative system has been in place for individual participation but the deals have been often in institution form and large financial institutions or private organizations will be responsible for organizing it. Due to the refusal of banks to do so, the second assumption is proved (Alsan, 2012 and Sadr, 2010).

The third assumption

The third axis was avoiding of applying unreal provisions In the participation contracts of Islamic banking. With respect to this that in various economic sectors, including manufacturing, service, trading - can Use - the partnership agreement as Islamic finance, now assume that applicant bank as two partners has manufacturing activity. The manufacturing activity, according to its kind after a while obtains return and the manufactured product would be sold and each of the partners has proportion of profit according to their share. What is more important is how to continue production activities. As we know manufacturing activities require a workshop or manufacturing plant or machinery and with respect to this that banking operations in interference with productive activities and supervising them is in conflict with the activities of enterprise so in continued participation both states are imaginable (Alavi, 2009).

1. After the first or second efficiency the term of contracts is finished and the property of company is split among them according to the capital of each of the partners that in this case, the production activities are banned.
2. Productive activities will be for many years and sharing of the profits and losses in proportion to each partner's investment in different years. Thus the third assumption is also proved and avoiding the formality condition is necessary.

Fourth assumption

Fourth axis of research did not consider the composition intention of parties for their consent because the client on the one hand based on the necessity of having capital it requires to interact with banks and also due to imposing conditions and guarantee of realized profit did not want to have all their capital before banks and referring to all participation contracts and examining their foundations it suggests that the fourth hypothesis is proved.

The research suggests appropriate models to remove existing deficiencies in short.

Proper patterns for participation contracts

In any society are two categories of funds applicants for investment

1. Those that have part of the capital necessary for economic activity and share the search.
 2. Those that do not have the capital necessary for economic activity, and are applicants for all of needed investment.
- Company contract answers the need of first group in all economic areas and to meet the needs of the second group, partnership contract in business and Mozare-eh and sharecropping contract in farming are partly adequate but there is no special participation contract from the fields of industry and services. To solve the second problem we need new contracts like Istisna'a or current contracts at new functions. It seems as contract companies provide the need of first group in all economic fields Jealeh contract also provide the second group need at best and in addition, it has no cumbersome terms of partnership and the sharecropping and Mozare-eh, and the peace contract can replace both the

companies and Jealeh and provides the needs of both of the groups.

1-First pattern: company contract and Mozare-eh

Banks can provide the first group's request at all economic sectors by company contract and share the applicants in proportion to its share in the profit and provide the request of the second group by Mozare-eh contract. This means that in all sectors of the economy, bank as inventor Provides the funding and share with the agent in the profit according to agreement. Now in the interest-free banking operations, company contract with the same features of the plan but the forecast Mozare-eh contract is very limited. Mozare-eh contract like company contract can be replaced by many banking contracts and have wide application. Banking facilities by the partnership and Mozare-eh contracts causes the problems and limitations related to the number and limitations of contracts to be resolved.

2-The second pattern: the peace contract

In this pattern, the peace contract replaces with the participation and Jealeh contracts. the provisions of these two contracts can be composed at all economic sectors. In addition, the specific circumstances of the company and Jealeh are not also necessary.

In other words the banks can composite the co-partnership, Mozare-eh, sharecropping and company provisions in the contract and determine the share of the partner or agent by percentage of profit. The bank can also as the cash investment owner provide the required investment in the industrial and service sectors and the profit obtained will be divided by an agreement between the bank and the agent. So all of interest-free banking operations of all of manufacturing, trade and services sectors can be realized with the peace contract in the form of sharing.

3-Investment Bank

Investment Bank as an effective institution in the capital market with the issue of shares for small businesses that are not able to enter the study provides based on partnership contract more broadly. Moreover does other activities of an investment company. In the current state of the country the bonds are only issued by the central bank. For the actual participation in profit and loss it is essential to grant the issuance right of bonds to other talented banks. Granting issuing of productive projects bonds to banks can lead the savings of people to the actual production with no increase of ownership of banks to firms. Moreover, a fair distribution of risk and return in the mobilization of resources can be achieved.

4- Co-partnership securities

Co-partnership securities issued by bank, the bank as co-partner shares the net profits in proportion to the pre-determined rate and the remaining proportion will be allocated to holders of securities. In case of loss if the bank has no failure or violation the securities holders would incur losses alone and the bank effort to manage and use these securities is wasted. At this bank has been tried that in the side of resources mobilization the depositors also share at the results of economic activity (profit or loss).

5- Istisna'a securities

Istisna'a or contract manufacturing order is a contract between two people natural and legal to produce a particular product or a project with specific features in the future some of which could be in cash and part of it in installments in proportion to the physical progress of the work or even independent of it. How it works is like this that the completion of major construction and national projects, government ministries signs Istisna'a contract just for the establishing or completion of projects with people who have been invited to tender. On the contrary, the institutions give Istisna'a securities or specified deadline instead of paying all or part of the money in cash that the plan is finished at that deadline or is being finished. The boundary between the Islamization and usury of these securities is not to pre-pay dividends to holders of securities accounts. Ordered goods to produce must be produced and sold after they were produced by the actual market price. The trick here is that if the premature payment of manufacturer has the same nature of the interest and this is a common problem in installment sales contracts. Also according to the prevailing system of production or completion of the contract projects it is now a major obstacle for the realization of this kind of contracts.

6- Rental sukuk

Leasing or selling of the benefits of an asset for a specified period at specified price. Under a lease contract the benefit of specific assets is transferred from one person to another. The contract is between the landlord and the tenant and rent is paid by the tenant to the landlord seasonally or annually. Securities represent the ownership of a leased asset and

may be traded in the secondary market. The issuers of rent sukuk can include central bank or other companies. Revenues from sales of sukuk are allocated to purchase capital goods. Rent of the goods would provide securities efficiency. Use of lease Sukuk is only for capital goods that are leasable including the financing of transportation sector and airports.

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